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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 448th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 14 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 4 (continued)

1. The CHAIRMAN invited the Commission to consider article 4(3). On the question of contracting-out of that provision, in his view it was the clear intention of the text as it stood that the parties were not permitted to agree that paragraph 2 of the article should apply to an unreasonable authentication. He would submit that it must be assumed that article 4(3) was one of the provisions referred to in the phrase "except as otherwise provided in this law" in article 3.

2. There was a proposal by Canada (A/CN.9/347, p. 6, sect. XII) to reword the paragraph in order to spell out its procedural effect, but he thought that the Commission would prefer for the time being to avoid getting into questions of procedure in the Model Law.

3. The United States of America (A/CN.9/347/Add.1, pp. 13-14) proposed the deletion of article 4(3), arguing that the parties should be permitted to agree on a procedure that was less than "commercially reasonable" if their own cost-benefit analysis persuaded them to do so. At the previous meeting, the Commission had added the words "under the circumstances" to paragraph 2(a) of the article (A/CN.9/SR.447, para. 30); the question arose whether, that being so, the parties' procedure should not be regarded as "commercially reasonable" in the circumstances. He hoped that, in the light of the previous meeting's discussions, the United States might reconsider its proposal for the deletion of the paragraph.

4. There was also a proposal from Japan on article 4(3) (A/CN.9/347, p. 36, para. 6), but he suggested that the Commission should first decide on its general approach to the paragraph.

5. Mr. BHALA (United States of America) said that the Chairman's interpretation of article 4(3) would make it easier for his delegation to accept the paragraph, but it still felt some concern. Supposing a customer - say a small business - told its bank that it would like to accept a less than "commercially reasonable" procedure for reasons of cost, and the bank agreed, then according to the Chairman's interpretation the agreement could be deemed to be commercially reasonable; as his delegation read the present text, however, the bank would have to tell the customer that it was precluded by the law from agreeing to the customer's request. Some might argue that the customer might not be sophisticated enough to assess the risks correctly. The point needed clarification.

6. The CHAIRMAN thought that a procedure might be commercially reasonable under given circumstances even if it were not in line with the prevailing criteria for commercial reasonableness. The paragraph was intended to provide a minimum safeguard, but not to prevent particular circumstances from being taken into account.

7. Mr. ABASCAL ZAMORA (Mexico) supported the United States proposal, which seemed reasonable. If the Commission wished to keep paragraph 3, he would like to reserve his delegation's position until the final amended text of paragraph 2 was available.

8. Mr. SCHNEIDER (Germany) said that he was sympathetic to the United States proposal. If "reasonableness" was understood objectively, it would be for a judge to determine whether a given procedure was reasonable. That was how he interpreted the present text; a procedure did not become reasonable simply because a party agreed to it. He therefore agreed with the United States view that it should be made clear that the customer might agree to a procedure which was not objectively reasonable. He had made that point at the previous meeting (A/CN.9/SR.447, para. 62).

9. Mr. VASSEUR (Banking Federation of the European Community) reminded the Commission that his delegation too had proposed the deletion of article 4(3) (A/CN.9/347, p. 67). It should be possible for parties to adopt in certain circumstances a method whose objective reasonableness could be disputed. Why could not, for example, parties agree that payment orders could be given by telephone and accepted on the basis of voice-recognition? It could be provided that such an agreement must be in writing, as proposed by the German delegation.

10. The CHAIRMAN wondered what the position of those who wanted article 4(3) deleted was in regard to agreements which were manifestly unfair and might be invalidated under general contract law.

11. Mr. IWAHARA (Japan) supported the interpretation of article 4(3) given by the Chairman. A minimum standard of security was needed so that customers could rely on the machinery of international credit transfers. There must be some mandatory rules, and commercial reasonableness, taking into account circumstances, should be a mandatory requirement. There might be cases where a customer with real bargaining power wished to negotiate a reduction in his bank charges, but such cases could be catered for as just indicated by the Chairman.

12. Mr. HERZBERG (Observer for Israel) expressed general agreement with what had been said by the representatives of the United States and Germany. Although the Chairman's suggestions were reasonable as far as they went, it would be important to make the text clearer; otherwise the paragraph should be deleted. Moreover, as he understood the text, authentication was not necessarily required. If that was so, why could not the parties agree to have a "loose" system of partial authentication?

13. Ms. KOSKELO (Observer for Finland) thought it was clear that the parties would be unable to agree to let paragraph 2 apply if there was no authentication at all. The risk in that case would be borne by the receiving bank.

14. She took the view that article 4(3) should be retained. The hypothetical case described by the United States delegation did not seem very realistic. Usually, a small customer of modest means would not be in a

(Ms. Koskelo, Observer for Finland)

position to enter into negotiations with the bank. The reality was that the bank's standard terms would govern the situation. If variation by agreement was allowed in such a case, the bank would merely have to obtain the customer's consent to standard terms. The criterion of commercial reasonableness must therefore be kept as a minimum standard, with no contracting-out permitted. She agreed that the standard should be interpreted flexibly enough to allow circumstances to be taken into account, including a situation where a customer expressly insisted on a particular method.

15. She would like to make a drafting suggestion in connection with the idea discussed at the previous meeting to insert in the article a provision that would exclude authentication by way of signature from the scope of paragraphs 2 to 4. She thought that paragraphs 2, 3 and 4 should be reformulated: the present paragraph 4 should follow paragraph 2 so that the two paragraphs could be taken together; they should be followed by a new paragraph stating that they did not apply where the authentication consisted of a comparison of a signature with a specimen signature; and those three paragraphs should follow the present paragraph 3.

16. Mr. DE BOER (Netherlands) said that his delegation believed that the effect of paragraph 3 would be to ensure that the parties were careful and perhaps preserved a record of the transaction, and that for that reason it should be retained.

17. Mr. ERIKSSON (Observer for Sweden) said that he agreed with the comments made by the observer for Finland.

18. Mr. SCHNEIDER (Germany) said that the best solution might be to insert a provision stating that the parties would not be held to have agreed that paragraph 2 should apply unless the authentication was commercially reasonable under standard terms of contract. However, the parties should also be given the possibility of agreeing on terms which did not conform to the criterion of commercial reasonableness.

19. Mr. LENNARD (Observer for Australia) said that an objection could be raised to the suggestion made by the German representative on the ground that there was no agreed definition of standard terms of contract.

20. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that he favoured the retention of paragraph 3 even if it did restrict the parties' freedom of action.

21. Mr. BURMAN (United States of America) said that courts would be the arbiters of what constituted commercial reasonableness. In practice, negotiations did take place between banks and clients with regard to authentication.

22. Mr. BHALA (United States of America) said that, while the customer should be the object of prime concern, it should also be borne in mind that the interests of the client included not only security but also facility of access to credit transfer services.

23. Mr. LIM (Singapore) said that banks should be in a position to determine which authentication procedures were binding on them and which were not, and thus whether or not article 4 applied in a given instance. In any case, the criterion of reasonableness must be applied in a way which made commercial sense.

24. Mr. ABASCAL ZAMORA (Mexico) said that he agreed with the viewpoint of the representative of Germany. However, security was an aspect which banks should not ignore if they were to retain their customers, and that notion fell within the scope of commercial reasonableness.

25. Mr. ADEDIRAN (Nigeria) suggested that, in order to cater for the concerns expressed by those delegations which opposed the inclusion of paragraph 3 of article 4, the words "under the circumstances" should be added to the paragraph so as to qualify the words "commercially reasonable".

26. Mr. KOMAROV (Union of Soviet Socialist Republics) welcomed that suggestion.

27. Mr. ERIKSSON (Observer for Sweden) said that it would be inadvisable to amend paragraph 3 in the manner suggested by the German representative because the resulting text might produce different results in different cases. The best solution would be to adopt the existing text with the amendment suggested by Nigeria. Such a solution would almost certainly lead to the results sought by the United States delegation and would probably be the only course acceptable to the majority of delegations.

28. Mr. VASSEUR (Banking Federation of the European Community) commented that a reference to standard form contracts would be appropriate for Germany and also for Switzerland and Belgium, but not for France, because French banks did not have such highly developed general conditions as those used by German banks.

29. He felt that it would be useful to incorporate in the Model Law a definition of "commercially reasonable" that was closely based on the content of article 4A-202(c) of the Uniform Commercial Code of the United States. That would be preferable to the amendment suggested by Nigeria, although the latter would provide a useful guide for readers of the Model Law in determining what circumstances were reasonable.

30. Mr. DUCHEK (Observer for Austria) said that his country approved the amendment proposed by Nigeria.

31. Mr. BURMAN (United States of America) pointed out that, although his delegation found the provisions of article 4A-202(c) of his country's Uniform Commercial Code relevant, it had not proposed that the definition it embodied should be incorporated in the Model Law.

32. Mr. SCHNEIDER (Germany) said that his delegation believed that decisions taken by a court would take into account objective criteria as to what was commercially reasonable. It was important that the provisions on authentication should cover payment orders made by means of telephone calls, a system which worked very well in Germany. He hoped that point would be brought out clearly in the Commission's report.

33. The CHAIRMAN said that he would take it, unless he heard any objection, that the Commission wished to retain paragraph 3 of article 4 and to add to it the words "under the circumstances" proposed by Nigeria; he suggested that the addition should be made at the end of the sentence.

34. It was so agreed.

35. The CHAIRMAN invited the Commission to consider article 4(4). He drew attention to the written comments by Canada on the words "present or former employee of the purported sender" (A/CN.9/347, p. 7, sect. XIII, second paragraph).

36. Mr. ABASCAL ZAMORA (Mexico) said it was necessary to consider the implications behind the suggestion by Canada that those words were too narrow in scope. If the question was whether the scope of the provision should be expanded to include persons related to the purported sender, his delegation would agree, and that would just be a matter of drafting. However, the point raised by Canada had not been dealt with expressly in the Working Group.

37. Mr. BURMAN (United States of America) said that his delegation had a recommendation which he felt would accommodate the comments made by Canada and also avoid discussion of the law of agency, namely that the commentary should contain a statement explaining that the word "employee" should be construed broadly. It was well known that payment orders were often initiated by persons who were not, strictly speaking, employees of the sender. A broad definition in the commentary along the lines he had suggested would eliminate lengthy discussion and complicated drafting of the Model Law itself.

38. Mr. ABASCAL ZAMORA (Mexico) suggested that the Drafting Group should be asked to examine the Canadian suggestion.

39. The CHAIRMAN said he felt that the Drafting Group would have difficulty in dealing with the suggestion unless delegations clearly indicated their views on the matter.

40. Mr. ERIKSSON (Observer for Sweden) said that his delegation could support the United States proposal provided that the definition of the word "employee" was not not too broad and that care was taken not to go beyond what Canada had suggested.

41. Mr. BURMAN (United States of America) said that his delegation's proposal was rather more far-reaching than the Canadian suggestion and would specifically include agents authorized to act on behalf of the sender, with particular reference to those corporations which used electronic or computerized transfer systems set up by specialists.

42. Mr. ERIKSSON (Observer for Sweden) said that his delegation could not accept anything broader than what Canada had suggested.

43. Mr. BURMAN (United States of America) said that a substantive discussion appeared to be necessary to determine whether the term "employee" was understood to refer simply to employees, officers and directors of the sender or whether it included external agents using the sender's facilities as well.

44. Ms. KOSKELO (Observer for Finland) felt that the problem which the proposal of the United States delegation addressed did not in fact exist because article 4(1) covered situations involving external agents.

45. Mr. GREGORY (United Kingdom) said that the concern expressed by the United States delegation would be met if, in line with the suggestion made by Canada in its written comments, the scope of article 4(4) was extended to include persons whose relations with the purported sender might have enabled them to obtain improper access to the authentication procedure. He asked the Secretary for clarification regarding the status of a commentary to the Model Law.

46. Mr. BERGSTEN (Secretary of the Commission) said that in the history of the Commission there had only been one commentary on a finished text prepared by the Secretariat, namely the Commentary on the Convention on the Limitation Period in the International Sale of Goods. If the Commission so wished, the Secretariat would prepare a commentary on the Model Law.

47. Mr. GREGORY (United Kingdom) had no objection to the proposal that the point under consideration should be dealt with in a commentary. However, the Model Law should be drafted in terms that could be understood readily without undue emphasis being placed on external documents.

48. Mr. BURMAN (United States of America) said that his delegation was prepared to work on the basis of what Canada had suggested in its written comments. In his view, the Commission's report, rather than a commentary, should reflect the understandings reached among delegations on various points.

49. The CHAIRMAN said that the report would be the document adopted by the Commission. He asked the Rapporteur to ensure, with the assistance of the Secretariat, that it reflected clearly the manner in which the Commission had interpreted the text of the Model Law.

50. He suggested that the Commission continue its discussion of article 4(4) by considering the following amendment: to use the words "any other person whose relations with the purported sender might have enabled him or her to obtain improper access" in order to extend the scope of the reference to employees. That wording was in line with the Canadian suggestion.

51. Mr. ABASCAL ZAMORA (Mexico) welcomed the change suggested by the Chairman.

52. Mr. LOJENDIO OSBORNE (Spain) also supported the amendment suggested by the Chairman. His delegation believed that the reference to employees should be broadened to include directors of the sender and all persons whose functions involved them in the types of procedure at which the article was aimed. At the same time he warned the Commission against broadening the scope of the paragraph too far, since a bank had thousands of employees, many of whom would have no possibility of access to authentication procedures; for that reason the word "employee" was inappropriate and should be dropped. However, if someone such as a window cleaner employed by the sender obtained access to the authentication procedure, he should not be excluded from the operation of the paragraph simply because it was not part of his functions to deal with authentication.

53. Mr. LIM (Singapore) supported the amendments suggested by the Chairman and by the Spanish representative. The word "employee" as it stood was very specific in meaning; in the absence of a definition of it, in his jurisdiction the term would not cover a director or a former director, although it might possibly cover an executive officer. It was illogical that the paragraph should fail to cover directors.

54. Mr. GREGORY (United Kingdom) said that his delegation could accept the amendment suggested by the Chairman if the words "through the fault of the purported sender" were deleted from the paragraph. If the word "improper" was used, they would become superfluous.

55. A reference to "employees" which did not mention directors or officers could certainly give rise to the difficulty which the representative of Singapore had mentioned.

56. Mr. BURMAN (United States of America) suggested that the text would be clearer without the word "improper". The intention was to cover people who had gained access to information or procedures properly, but whose use of it had been improper.

57. Ms. KOSKELO (Observer for Finland) said that the wording suggested by the Chairman would be improved if the words "might have enabled" were amended to read "had enabled".

58. Mr. LIM (Singapore), commenting on the statement made by the representative of Spain, said that it seemed to him that if a cleaner had access to the sender's authentication procedure, was an employee of the sender, and had the keys which would enable him to use the authentication equipment, he would not be someone whom the Working Group had intended to exclude from the operation of the paragraph.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission approved paragraph 4 of article 4 with an amendment reflecting the substance of what he had suggested; and that the Drafting Group be asked to deal with that and with the other changes which delegations had proposed.

60. It was so agreed.

61. The CHAIRMAN invited the Commission to consider article 4(5). He drew attention to a proposal by the delegation of Finland in its written comments to add, at the beginning of the first sentence, the words "subject to the preceding paragraphs" (A/CN.9/347, p. 17). He wondered whether that change was really necessary because, supposing paragraphs 2, 3 and 4 to be in force, their provisions would surely apply to paragraph 5 also. In addition, the Canadian delegation had suggested in its written comments that the scope of paragraph 4(5) should be expanded to include revocation of a payment order (A/CN.9/347, p. 7). In his view that was correct, since paragraph 4(1) also referred to "revocation of a payment order".

62. Mr. ABASCAL ZAMORA (Mexico) said that the proposal of the delegation of Canada to broaden the sphere of application of article 4(5) was reasonable.

63. Mr. IWAHARA (Japan) said that it would be best if discrepancies in payment orders due to fraud were dealt with in article 4(5); if that was done, alterations to payment orders by unauthorized persons might also be dealt with in article 4(5) instead of in article 4(1).

64. Ms. KOSKELO (Observer for Finland) said that her delegation's suggestion was purely one of drafting. It found the proposed wording awkward and had attempted to find something neater.

65. Mr. ERIKSSON (Observer for Sweden) expressed the opinion that paragraphs 4 and 5 should both include a reference to the revocation order as well as to the payment order, since an employee might send a payment order in favour of himself and be detected, which would require his employer to send out a revocation order.

66. The CHAIRMAN asked if paragraph 5 was acceptable to the Commission with that change.

67. It was so agreed.

The meeting rose at 5 p.m.